

1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE
3 TRADEMARK TRIAL AND APPEAL BOARD
4 -----
5 WALTERS GARDENS, INC.,
6 Opposer,
7 vs. OPPOSITION NO. 91153755
8
9 PRIDE OF PLACE PLANTS, INC.,
10 Applicant.
11 -----

12 DEPOSITION OF: August 30, 2004
13 CHAD MICHAEL WALTERS 1992 96th Avenue
Zeeland, Michigan

14 Appearances - BARRY C. KANE, P-45851
15 Attorney for Opposer
16 LAUREN E. SCHNEIDER, ESQ.
17 Attorney for Applicant

18 Recorded By - NETWORK REPORTING CORPORATION
19 Sandra Corsiglia, CER-3454
20

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25

1 (Deposition scheduled to start at 9:00 a.m.;
2 actual start time was 9:20 a.m.)

3 MR. KANE: Good morning, Chad.

4 MR. WALTERS: Barry.

5
6 C H A D M I C H A E L W A L T E R S, having been
7 called as a witness on behalf of the Opposer, and
8 having been first duly sworn, testified as
9 follows:
10

11 DIRECT EXAMINATION BY MR. KANE:

12 Q Chad, would you please state your full name for the record,
13 please?

14 A Yup. Chad Michael Walters.

15 Q Chad, I'm just going to start off with a little bit of an
16 introduction here. Have you had your deposition taken
17 before?

18 Q No.

19 Q We have the court reporter here. She has a recording
20 device, and she's taking some notes as well. I'm going to
21 ask you some questions. We're going to ask that you give a
22 verbal response, simply because the recorder isn't going to
23 be able to reflect a nodding of the head.

24 A Uh-huh (affirmative).

25 Q And an example of your "uh-huh," it doesn't -- sometimes

1 doesn't come across clearly so it'll have to be a "yes" or
2 a "no" --

3 A Okay.

4 Q -- or "I don't know," or some other verbal response would
5 be -- would be great. She is using a recorder, so
6 "uh-huh's" might come across, but some people may not be
7 able to distinguish that between a negative or a positive
8 response.

9 A Okay.

10 Q Okay. I'm going to call you Chad; right? That's your full
11 name?

12 A Yes.

13 Q It's not Charles?

14 A Nope.

15 Q Okay. Chad, can I get your address?

16 A Home address?

17 Q Residence address, yes.

18 A 4687 Sheldon Court, S H E L D O N. It's Hudsonville,
19 Michigan 49426.

20 Q And are you currently employed, Chad?

21 A Yes.

22 Q And what is your current position?

23 A I'm inventory manager.

24 Q And the name of the company you're employed with?

25 A Walters Gardens, Inc.

1 Q Do you -- how long have you occupied this position of
2 inventory manager?

3 A A little over six years.

4 Q Now, what are your duties as the inventory manager?

5 A I set goals for sales and watch the crops and monitor
6 stuff -- basically I'm relaying information from our fields
7 and greenhouse to the salespeople to let them know how many
8 of each variety they have to sell.

9 Q Okay. Prior to becoming inventory manager for Walters
10 Gardens, did you have another position?

11 A I previously worked for my uncle at WW Greenhouses, a
12 retail greenhouse, in Hudsonville.

13 Q What was your position with WW Greenhouse?

14 A I don't know if I really had a position. It was just
15 general greenhouse work.

16 A Okay. Now, was WW -- what type of business was WW
17 Greenhouse?

18 A They're a retail facility, and they also grow wholesale for
19 Walters Gardens.

20 Q How long were you with WW Greenhouse?

21 A Approximately nine years.

22 Q Chad, prior to WW Greenhouse, what did you do?

23 A I had worked for my dad in the fields when I was -- during
24 school.

25 Q Okay.

1 A That was J&R Nursery.

2 Q You mentioned this was during school?

3 A Yeah, when I was a teenager and -- I was about 12 years old
4 or something like that.

5 Q Oh, I see. This was when you were in high school?

6 A I think I was done by high school, I believe. Yeah. I
7 think I was at WW Greenhouses by then.

8 Q All right. Where did you go to high school?

9 A Unity Christian --

10 Q Okay.

11 A -- in Hudsonville.

12 Q And when did you graduate Unity Christian?

13 A 1993.

14 Q Did you attend university?

15 A Yup. Grand Valley State University.

16 Q When did you attend Grand Valley State University?

17 A Fall of 2003 'til spring of '98 -- or '9- -- '93 to '98,
18 yeah.

19 Q Thank you. I was -- another question popped up in my head
20 here. 1993 to 1998?

21 A Yes. Graduated spring of '98.

22 Q And what did you obtain your degree in?

23 A Business administration.

24 Q So once you obtained your degree in business

25 administration, did you come to work for Walters Gardens at

1 that point?

2 A Yes. About a month after that I started here.

3 Q Okay. Did you take any horticultural classes at Grand
4 Valley?

5 A No.

6 Q But the business of horticultural field was not a -- was
7 not a foreign --

8 A No. I've been raised in the business, basically.

9 Q Do you also have a no business that you're running
10 presently?

11 A Yup; yes. I am co-owner of Garden Crossings, LLC.

12 Q And what is the nature of the business regarding Crossings?
13 It's Garden Crossing or Garden Crossings?

14 A Garden Crossings, plural.

15 Q What is the -- what is the nature of the business?

16 A We have a website that we sell perennials on line, and we
17 also grow wholesale for Walters Gardens.

18 Q How long have you been -- how long have you -- and when I
19 say "you," I mean Garden Crossings, LLC -- been in
20 business?

21 A We started -- we officially formed the company -- I believe
22 it was January of 2000.

23 Q And since January of 2000, what has been the geographic
24 scope of your customers?

25 A As far as how widely I distribute?

1 Q Yes.

2 A All over the US except for Hawaii and Alaska.

3 Q What is the name of the website?

4 A Gardencrossings.com.

5 Q With the ubiquitous www in front of it?

6 A Yes; yes.

7 Q I believe you mentioned that you're a perennial distributor
8 or online retailer?

9 A Yes. We don't do any shrubs or annuals but just
10 perennials, Clematis, grasses, those type of plants.

11 Q Do you sell live plant material, or do you sell seeds?

12 A Live plants.

13 MR. KANE: I know, Lauren, you didn't like that
14 question, but --

15 Q Can you describe how these plants are -- you know, from the
16 beginning, the process from when they first start to grow
17 to the time that you put them out the door?

18 A Sure. We basically buy stuff in from a number of different
19 wholesale growers and we start planting in December,
20 January time. And our planting season goes to about March,
21 and then by early April through October we ship our product
22 out. We ship as little as one pot to a customer, no
23 minimum order, and basically do a once-a-week shipping.
24 Fed-Ex picks on Mondays, and it's pretty simple.

25 Q What are the size of the pots that you ship?

1 A They're -- we call them a 2-quart pot. They're about 5-1/2
2 inches by 6 inches deep. They're a pretty good-size pot.

3 Q And how old is the plant when -- at the time it's in
4 that -- it reaches that pot?

5 A It's technically a two-year plant. The wholesaler grows it
6 for one year, and it goes through a dormancy. When we're
7 potting it -- we plant most of our stuff when it's dormant
8 in the winter. And then we're putting a second year growth
9 on it.

10 Q So you're receiving live plant material from the
11 wholesaler; correct?

12 A Uh-huh (affirmative).

13 Q This is a plant that has leaved out?

14 A Yes; yes. It may be dormant and, you know -- you know,
15 cold for the winter, where all the foliage is gone. But
16 it's a live plant, yes.

17 Q Okay. Do you produce a catalog for your material?

18 A No. Just our online catalog.

19 Q Can you monitor your website to determine who's
20 accessing -- browsing your website?

21 A As far as demographics, what type of person?

22 Q (No verbal response)

23 A We can -- we know that a majority of our customers are
24 women. As far as -- we can't monitor like their age, but
25 we know -- you know, we can tell what geographic area we're

1 getting more customers from. Besides geographics and their
2 name, we don't have too much more info. Like their age,
3 you know, a lot of times we assume our -- our target market
4 is probably women probably 40 to 60, something like that.

5 Q How do you obtain this demographic information?

6 A We can run a sales report by state and we can see how many
7 orders came in for -- by states. And then, I guess, we
8 would want to look at the percentage of women versus men,
9 and we'd have to -- have to sit down and manually figure
10 that out.

11 Q Okay. So I assume that in determining the gender of the
12 customer you go by customer name primarily?

13 A Uh-huh; yeah; yeah. We don't require them to enter that or
14 anything --

15 Q Sure.

16 A -- on the order form or --

17 Q Have you ever used any third-party demographic survey
18 companies?

19 A No.

20 Q Can you give me an idea -- an estimate of the number of
21 individual sales -- plant sales that you make on an annual
22 basis?

23 A Just for my retail part of the Garden Crossings --

24 Q Yes.

25 A -- or wholesale too or --

1 Q Well, let's just talk about the retail.

2 A I would -- I would have to guess it's only probably about
3 in the 20,000 range, something like that. It's probably a
4 little more than that. I haven't looked since spring
5 really where we're sitting right now. My partner takes
6 care of the finances.

7 Q Sure. And we did catch you kind of recently. Do you --
8 you didn't plan this well in the future. Do you recall
9 when we contacted you?

10 A I don't recall the exact date.

11 Q Do you remember the month in which we contacted you?

12 A I can't say for sure.

13 Q Was it within the last four weeks, perhaps?

14 A Yeah.

15 Q Okay. How do you receive your orders on the online
16 business side?

17 A Customers enter their information and submit the order, and
18 it's -- we -- at the end of the day we'll upload all the
19 orders into our software and that's about it. We don't --
20 some customers do fax the info. We don't have a printed
21 catalog where we receive mailings, you know, mail order
22 forms or anything like that. Most of it's all done online.

23 Q Are the orders -- when you say "online," are they in the
24 form of e-mail?

25 A No. They're automatically put into our back page of our

1 website. So we don't receive an e-mail notification
2 listing the order. It's just automatically done at the end
3 of the day; just everything's uploaded in.

4 Q Okay. Is the term -- if I use the term "Shopping Cart" --

5 A Yup.

6 Q That's the format you use?

7 A Uh-huh (affirmative).

8 Q So the customer can input their customer name; is that
9 correct?

10 A Yup.

11 Q Do they put in their address?

12 A Yup.

13 Q And is the address often a billing address and a mailing
14 address?

15 A They have to -- there's a billing address and then the next
16 screen is like a shipping address. And it defaults,
17 usually, if they want to change it to a different ship-to
18 address.

19 Q Okay. And what other information is included on this
20 Shopping Cart page?

21 A Their home phone number, e-mail and their credit card
22 information. That would be about it.

23 Q Do you have --

24 A And then there's a comment line, you know, if they want to
25 say anything.

1 Q Do you accept Pay Pal?

2 A No.

3 Q Darn. All right. How do they identify the plant that they
4 want to order -- or plants?

5 A Most of them will either -- if they've heard of some plant
6 that they're looking for or they're just browsing, you
7 know -- it's -- scroll through our catalog. We've got it
8 divided in by alphabetical sections and, you know, we've
9 got a section for Hostas and Clematis and 'Day Lilies' and
10 everything.

11 Q So when -- if I understand this -- and I'm basing this on
12 my own experience.

13 A Uh-huh (affirmative).

14 Q If I were to go to your web page and I would find a
15 particular Hosta, --

16 A Uh-huh (affirmative).

17 Q -- is Hosta the genus name; do you know?

18 A Yeah.

19 Q Okay.

20 A Yeah.

21 Q So it's -- in this case we'd go to Hosta and then under
22 that we would find -- how are they divided out under Hosta?

23 A Alphabetically by -- by cultivar name.

24 Q Okay.

25 A So it would be -- like Hosta, I think 'American

1 Sweetheart' is our first one, and then it goes right down
2 the list.

3 Q Do you -- do you have a -- do you also provide a picture of
4 the plant?

5 A Yup. Everything's pictured -- pictured with a description
6 and we try to give as detailed a description as possible.

7 Q And where does this description information come from?

8 A A lot of it will come from our wholesalers, like the
9 Walters Gardens catalog, some other wholesalers that buy
10 stuff, or we have some plant, like, reference books that we
11 dig up some information on each individual plant.

12 Q Okay. You mentioned in particular that your nursery
13 handles Clematis?

14 A Uh-huh (affirmative).

15 MS. SCHNEIDER: Objection. I believe he actually
16 testified to that.

17 MR. KANE: All right. We're not going to have an
18 argument here, but --

19 Q What type of plant material does your retail nursery sell,
20 what types?

21 A What types? We sell perennials, Clematis, Hostas, 'Day
22 Lilies,' which, I guess, you can consider all those under
23 perennials, too -- ornamental grasses. I think that covers
24 all the types.

25 Q Is Clematis a perennial plant?

1 A Yes. It comes back every year around here.

2 Q Is it also classified as a -- how else is it classified?

3 A Some people might consider it like a flowering vine.

4 Q Is the term "woody vine" sometimes used in connection
5 with --

6 MS. SCHNEIDER: Objection. Leading.

7 Q It's all right. You can -- you can answer the question.

8 A It's aw -- say it again?

9 Q Is it also known as a woody vine?

10 A Yes, it's considered that; yup.

11 Q Okay.

12 A Yup.

13 Q How are the Clematis listed in your online catalog?

14 A We have it broken up between the first half of the alphabet
15 of Clematis -- we have so many varieties we don't put them
16 all under one section. We have Clematis like A through L
17 or something like that, then the balance. And then it's
18 listed alphabetically by cultivar name under there.

19 Q If I wanted to browse, if I didn't know a particular
20 variety name, how would I browse the Clematis section?

21 A If you didn't know the variety name, it would be just going
22 to the Clematis section and just scrolling down the list.

23 Q Okay. Can you please describe for me a typical record in
24 the Clematis section, how it would appear?

25 A Uh-huh (affirmative). You would have -- first, you'd have

1 a picture, then a -- the specific Clematis listed at the
2 top. And there would be a brief description. And when you
3 actually click onto the picture or the name, it'd pull up
4 more detailed information with characteristics, whether
5 it's sun-loving or prefers shade or the pruning type. But
6 the Clematis might be -- any other specifics that we might
7 have information on there for. It's all on a separate
8 detail page.

9 Q All right. You mentioned that you get that -- some of that
10 description. It may come from a -- the wholesaler; is that
11 correct?

12 A Correct.

13 Q You also said you use references?

14 A Uh-huh (affirmative).

15 Q Do you -- do you write the descriptions for each of the
16 Clematis that are on your website?

17 A Yes.

18 Q What type of references do you use for Clematis?

19 A We have two Clematis encyclopedia -- they're basically
20 encyclopedias that we use. I can't say what the names of
21 them are right now. I don't remember what they are.

22 Q What kind of information do you get from these
23 encyclopedias?

24 A We'll get information like bloom time, how they list the
25 specific plant's name and just some of the habits of the

1 plant. Anything that -- our wholesale lists are usually
2 more -- the wholesale catalog is a lot of times kind of
3 brief in their descriptions and lots of times we are
4 looking for a little more information to spice up the
5 description or just anything else that would be pertinent
6 to that variety.

7 Q Okay. In terms -- with respect to the term "Clematis," is
8 that a common name, or is a scientific name?

9 A I know it's common. I guess it would be scientific, too.
10 I don't know of it as any other name.

11 MS. SCHNEIDER: Objection. That's speculation.

12 Q Do you know if Clematis is a genus -- represents a genus?

13 A Yes, it is.

14 Q So it is; correct?

15 A (No verbal response)

16 Q And how do you -- what's the format of the -- of the names
17 that you use in your catalog? How do they appear?

18 A They would all list like Clematis. Then the specific
19 cultivar would be in quotes after that.

20 Q And quotes come in two forms?

21 A Single quotes. Sorry.

22 Q Single quotes. And how do you identify the cultivar name
23 when you -- that's ambiguous. Is the cultivar name given
24 to you when you purchase plants from a -- from a grower?

25 A Yes.

1 Q And how does that -- how does that name appear? Is it --
2 is it -- is it on an order form?

3 A Yup. It would be in our catalog and on an order form and
4 on our acknowledgments and invoices that we receive from
5 them.

6 Q Okay. Is there any identification on the plant material
7 that you purchase when you receive it from the wholesaler?

8 A Yes. It would have -- it would have a tag for each
9 variety.

10 Q What information is contained on this tag?

11 A Depends -- sometimes it can be just the genus and specific
12 cultivar. Otherwise, it can be a picture tag with
13 description and plant characteristics on it.

14 Q In the case where it's just the genus and cultivar name, --

15 A Uh-huh (affirmative).

16 Q -- how sophisticated are those tags? What's the gamut for
17 those tags? How do they appear?

18 A They're pretty simple. I know we have a Hosta supplier
19 that will usually just give us a black-and-white tag. It
20 just has the name and then I think it usually says like --
21 just like the height of the plant and it's real brief.

22 Q Does it carry any source identifying information on the
23 tag?

24 A As far as like a Walters Gardens tag would not. We do have
25 tags from other customers that would have a source, like a

1 symbol or something on the back, that we would know that
2 that's where it's from.

3 Q Are you familiar with the term -- I'm going to spell it,
4 because pronunciation is different. But it's 'P I I L U.'

5 A Yes.

6 Q And how are you familiar with that term?

7 A That is one of the Clematis varieties that we sell.

8 Q Does 'Piilu' have any other meaning that you're aware of?

9 A As far as -- the only meaning that I know of it has is from
10 Pride of Place Plants saying that it technically means
11 "little duckling."

12 Q Okay. So they're saying that it's a translation?

13 A That's how I understood it.

14 Q Okay. When did you first encounter, to the best of your
15 recollection, the term 'Piilu'?

16 A I knew Walters Gardens was looking into getting that --
17 into getting 'Piilu' -- I don't know -- three or four years
18 ago. And when we saw it available through Spring Valley
19 Gardens, we picked it up through them.

20 Q Okay. Let's go back to the three or four years ago. When
21 you encountered 'Piilu' in what capacity were you acting?
22 Were you -- because three or four years ago you were
23 working with -- for Walters Gardens; --

24 A Uh-huh (affirmative).

25 Q -- correct?

1 A Uh-huh (affirmative).

2 Q And was Garden Crossings in existence at that time?

3 A Yes; yup.

4 Q Okay. So when you say "we encountered it," did you
5 personally encounter it, 'Piilu'?

6 A I had been familiar with it, 'cause I knew -- I usually
7 know a lot of the new items we're looking at to get into
8 our catalog. And I know that this Clematis 'Piilu' was one
9 that they were looking to try to add. And I'm always
10 looking ahead on a new variety that can add to our catalog.
11 So I know we had interest in it at Walters Gardens, and I
12 was trying to find a source for myself. And I couldn't get
13 it through Walters Gardens at the time. So then I found
14 out that Spring Valley did carry it.

15 Q Okay. And back at that time when you first were -- you
16 said you were offered 'Piilu', who was offering it to you,
17 to Walters Gardens?

18 A The grower -- then Polish grower. I'm not in charge actual
19 Clematis inventory, but I know it's a Polish grower -- I
20 can't pronounce his name -- that offered it to Walters
21 Gardens.

22 Q Okay. So this was a Polish grower based in the United
23 States or overseas?

24 A Overseas.

25 Q Okay. Is it unusual -- do you receive other plants from

1 overseas; do you know?

2 A We do buy in, yeah, certain varieties.

3 Q Are they shipped directly into the United States?

4 A Yes; yeah. They have to be inspected at the -- by the USDA
5 when they come in.

6 Q Okay. When you were offered this variety of Clematis, the
7 'Piilu' variety, --

8 A Uh-huh (affirmative).

9 Q -- from the Polish grower, you mentioned that you -- you
10 mentioned that you conducted an investigation? You looked
11 into the availability?

12 A Yeah. I had checked with the person who takes care of the
13 Clematis inventory. I know I had kind of questioned when
14 we -- if we could get that or -- I was just, you know,
15 keeping tabs on if it was going to be available. But then
16 it turned out not to be.

17 Q It turned out -- I'm sorry. It turned out not to be
18 available?

19 A Well, not to be available through Walters Gardens,
20 'cause -- for this whole naming situation, they did not go
21 with it.

22 Q Oh, I see. Did you determine that the 'Piilu' Clematis was
23 available somewhere else in the United States?

24 A Yes, I -- yup. I found it through Spring Valley Gardens.

25 Q And did you ultimately acquire for one of the businesses

1 plants from Spring Valley Gardens?

2 A Yup. I purchased -- spring of 2003 I purchased plants from
3 Spring Valley for Garden Crossings and in this past spring
4 also.

5 Q And in those purchases did you purchase 'Piilu' -- 'Piilu'
6 (pronouncing)?

7 A Yes.

8 Q When those plants were shipped to you, were they
9 accompanied -- did they -- did they have identifying
10 information on them?

11 A Yup. They come with one tag for every plant, and the tag
12 had a picture and descriptive information and said
13 "Clematis 'Piilu'" on it.

14 Q Can you describe the tag for us, please?

15 A Yeah, I can. It's an oval, probably about 4 inches tall.
16 It just has a picture on the front and at the bottom it
17 says "Clematis" and then "'Piilu'" in single quotes after
18 that. Then on the back of the tag is all the plant
19 characteristics and, I think, the Spring Valley logo was on
20 there.

21 Q Okay. Do you know where Spring Valley obtains its plant
22 material?

23 A I do not. I would assume they produce their own cuttings.

24 MS. SCHNEIDER: Objection. Speculation.

25 Q And on what basis would you formulate that -- would you

1 have that assumption?

2 A That I'm -- well, I know that they are a grower -- one of
3 the largest growers of Clematis in the United States. I
4 don't -- they may buy product in and grow it. I do not
5 know.

6 Q Okay. Is Walters Gardens a grower of plants?

7 A Yes.

8 Q Do they propagate their own material from -- well, let's --
9 let's -- I'm going to get an objection here, but let's
10 re- -- strike that and rephrase the question. How are the
11 plants grown here? Where do they come from? And by "here"
12 I mean Walters Gardens.

13 A Okay. Most of our plants are propagated from our own
14 vegetative stock plants or from seed that we purchase in.
15 There are certain varieties that we buy in and just re- --
16 we ship them out after we re-pack them -- we do not do the
17 growing for.

18 Q When they -- in the latter example, --

19 A Uh-huh (affirmative).

20 Q -- when the plants come in and you just re-package them, do
21 they come in the form of -- when I use the term "plugs,"
22 does that have a meaning for --

23 A Yes, that has a meaning.

24 Q Could you explain it for me, please?

25 A I think everything that we buy in, I'm pretty sure, is bare

1 root plants so they would be -- they would not be in a plug
2 form. They would be just the bare root, dormant plant.

3 Q Okay. So in the case of Spring Valley Gardens, --

4 A Uh-huh (affirmative).

5 Q -- is their business substantially equivalent to what
6 Walters Gardens does?

7 A As far as --

8 MS. SCHNEIDER: Objection. I think he's got a lack of
9 personal knowledge on that subject.

10 A I know that they are a grower like us. I don't think
11 they're to the scale as what we are. We're a lot more
12 diverse. They're specific in Clematis growing.

13 Q So they're a specialty --

14 A Yeah. Yes, I would say they're a specialty grower.

15 Q Have you -- have you -- do they offer a catalog?

16 A Yup.

17 Q Have you seen the catalog?

18 A Yes, I have.

19 Q Is that what you use to base your orders on?

20 A Yes.

21 Q Did you do it online?

22 A I don't order online through them. They do have a website.

23 Q Okay. How are your orders placed?

24 A I believe we fill out their order form and fax it to
25 them --

1 Q Okay.

2 A -- or we have done phone calls for orders, too.

3 Q Do you have any -- do you ever have any communications --
4 oral communications with them?

5 A I can't -- I'd say we probably have. I don't -- can't say
6 recently I've talked to them.

7 Q Sure. Are you familiar with the International Code of
8 Nomenclature for Cultivated Plants?

9 A I've heard of it.

10 Q And in what context have you heard of this -- heard this
11 term -- this name?

12 A I believe I heard that when -- oh, when they were putting
13 our catalog together, I know they -- I think they refer to
14 that for plant names. And it's not something that I
15 would -- that I use particularly.

16 Q So I understand you have not referenced this in connection
17 with your --

18 A For Garden Crossings?

19 Q -- Garden Crossings?

20 A No.

21 Q Okay. Are you familiar with the International Clematis
22 Register and Checklist?

23 A Yeah, I've heard of it; yes.

24 Q You have not personally referenced it?

25 A Myself, no.

1 Q Okay. Do you know if your partner has referenced it for
2 Garden Crossings?

3 MS. SCHNEIDER: Objection. Lack of personal
4 knowledge.

5 MR. KANE: Well, I'm asking if he knows.

6 Q You can go ahead and answer.

7 A I would -- I would say he probably has. I cannot guarantee
8 it.

9 Q Okay. So you do not know?

10 A I do not know.

11 Q With respect to Garden Crossings business, have you
12 personally worked on your inventory for Clematis 'Piilu'?

13 A As far as numbers that we speculate that we can sell each
14 year and handle and that type of -- yes, I have. My
15 partner and I set our -- we set the goal amounts that we
16 want to -- assume we can sell every year and what we want
17 to purchase in.

18 Q Are you responsible at Garden Crossings for making sure
19 that the text for your online catalog is how you'd like to
20 see it?

21 A Yes; yup.

22 Q Do you recall if you personally worked on the description
23 for Clematis 'Piilu'?

24 A I would have, yes.

25 Q Did you work on the descriptions for your other Clematis?

1 A All of them.

2 Q And I assume -- and you can correct me. Do all -- do all
3 Clematis that you handle have a formal variety -- a name
4 assigned to them?

5 A Yes, they do. There's -- there's one variety that is a
6 species. It's not a cultivar. There's one like that that
7 we carry.

8 Q Okay. Can you help me out with the distinction between
9 species and cultivar?

10 A Yes. Species -- the one that we carry is called Clematis
11 paniculata, which is just listed all in small text, not in
12 single quotes. If there were different cultivars of that
13 species, it would probably be listed as 'paniculata'
14 whatever in single quotes. Mostly Clematis or cultivars
15 are just listed as the Clematis genus and the cultivar
16 name.

17 Q In connection with your Garden Crossings business and your
18 sale of material online, --

19 A Uh-huh (affirmative).

20 Q -- once the material is shipped, is that the last
21 communication you have with the customer?

22 A No. We will -- there's an e-mail that's sent to the
23 customer after it's been shipped, to notify them that their
24 product is on the way and their credit card has already
25 been billed at that point. The only notification after

1 that would be if the customer called us back or e-mailed us
2 and had a question or concern regarding their order.

3 Q Okay. And in that correspondence how do they refer to the
4 plant or plants that they're --

5 MS. SCHNEIDER: Objection. Hearsay.

6 Q How are these communications received?

7 A Usually by e-mail, occasionally phone.

8 Q Okay. And in these e-mails how is the plant -- how is the
9 plant referenced?

10 MS. SCHNEIDER: Same objection.

11 MR. KANE: It's coming to him as direct correspondence
12 to him.

13 Q How does the name appear?

14 A The customers usually state the name how they -- how they
15 see it on their invoice, whether -- usually -- a lot of
16 times they'll put the invoice number on there. But the
17 invoice matches what we have on the catalog.

18 Q Okay. We're almost finished here. Chad, when you buy
19 plants for your online business, --

20 A Uh-huh (affirmative).

21 Q -- how do you make a decision on where to purchase plant
22 material from?

23 A We decide on price, availability from different wholesalers
24 and reputation of certain wholesalers. A lot of our
25 Clematis is only available through certain wholesaler

1 nurseries, so it's -- it's not really too much of an
2 option. That is probably the biggest thing that --

3 Q Okay.

4 A -- determining factor.

5 Q And in the period that you -- how long have you been
6 handling Clematis 'Piilu', again?

7 A This is our second year growing it.

8 Q Okay. Did you conduct an investigation of sources prior
9 to --

10 A I looked online to see if there was other Clematis
11 wholesalers that were selling it, and I -- the only one I
12 found was Spring Valley, to my knowledge. That's where I
13 picked it up from.

14 Q Okay. Are you familiar with the nursery by the name of Joy
15 Creek?

16 A Yes, I've heard of that.

17 Q Okay. Do you know where they're located?

18 A I don't remember.

19 Q Okay. Do you know if -- what type of nursery they are?

20 A I believe they're a perennial nursery.

21 Q Okay. Have you -- are you familiar with the name Chock
22 Hill?

23 A Yup. That's a -- I believe that's a specialty Clematis
24 nursery.

25 Q And do you know where they're located?

1 A Out west somewhere. I don't know.

2 Q Do you know if Chalk Hill Nursery carries Clematis?

3 A Yes, they do.

4 Q And how do you know this?

5 A I've looked at their website before.

6 Q All right. And the reason that you looked at their website
7 is?

8 A Most likely to see which varieties they were carrying and
9 prices that they were listing their plants for.

10 Q So something like marketing; you're -- comparison?

11 A Yes.

12 Q Okay.

13 A Yup.

14 Q Have you ever visited the Joy Creek --

15 A Website?

16 Q Yes.

17 A Yes, I've been on their website probably a long time ago.

18 Q Okay. Are you familiar with the name Roseville Farms?

19 A Yes; another Clematis supplier.

20 Q Okay. Were you aware of that supplier back when you first
21 started to carry 'Piilu'?

22 A I had probably heard of them back then. It's not one of
23 our Clematis suppliers that we purchase from.

24 Q Okay. So am I to assume from that comment, then, that

25 Walters Gardens has made other purchases from Spring Valley

1 Gardens for Clematis?

2 A You mean Garden Crossings, have they --

3 Q No. I want to talk about Walters Gardens.

4 A Oh. Okay. Yeah, Walters Gardens purchases -- they've
5 purchased Clematis from them -- from Spring Valley.

6 Q Okay. When you were -- when you first introduced Clematis
7 'Piilu' --

8 A Uh-huh (affirmative).

9 Q -- two years ago now -- right? --

10 A Yes.

11 Q -- were you informed or instructed on how to list the plant
12 name?

13 A No.

14 Q Were you ever given any notice that the term 'Piilu' is a
15 trademark when you first carried the plant?

16 A No.

17 Q Okay. At the time that you purchased Clematis 'Piilu',
18 were you ever informed that it was a brand?

19 A No.

20 Q And when you sold it to your customers -- I should say when
21 you listed it on your website, did you indicate that
22 'Piilu' was a brand of any particular company?

23 A No, not back then. Now we do list it as -- we have the
24 left "t.m." symbol there behind the name now with "(Little
25 Duckling)" in parentheses, if someone was looking for

1 Little Duckling under that name that they could reference
2 it.

3 Q Why the change?

4 A We originally got an e-mail from Pride of Place this past
5 December saying that we had it listed as a p.p.a.f. plant,
6 which I knew that Walters Gardens was working on this whole
7 situation and at the time I wasn't quite sure how to list
8 it. And this letter had indicated all the catalog
9 information had to be changed to this new wording, which at
10 first I did -- I think we changed it on our website and
11 after talking with Clarence Falstad from Walters Gardens
12 here, he suggested, "Do not follow what that letter says."

13 MS. SCHNEIDER: Objection. Hearsay.

14 Q So you were purchasing plant material from Spring Valley
15 Gardens?

16 A Yes.

17 Q And that was your only contact with respect to Clematis
18 'Piilu'; correct? That was the only source?

19 A Uh-huh; yes.

20 Q And you just told me that you received a letter from Pride
21 of Place Plants?

22 A An e-mail.

23 Q An e-mail. And who was the author?

24 A The authority was Rick Sorenson.

25 Q Okay. And why would Pride of Place Plants be contacting

1 you for plant material that you're buying from Spring
2 Valley Gardens?

3 MS. SCHNEIDER: Objection. Speculation.

4 Q Why did he state -- what did he state in his letter?

5 MS. SCHNEIDER: Objection. Hearsay.

6 Q You can go and answer. There's no judge here.

7 A Okay. He stated that there was a name change, basically
8 talked about talking to the breeders, that this was the
9 correct -- it actually had translated to -- I believe it
10 was they want it listed as 'Kivso' p.p.a.f. -- or 'Kivso'
11 p.p.a.f., 'Piilu' t.m., and then -- I can't remember the
12 exact specifics of the letter. And I don't -- I would
13 imagine he sent -- I don't know if he sent that to us
14 directly or if Spring Valley sent that to all our customers
15 forwarded from him, but it did have his name on there and
16 Pride of Place signature on the bottom.

17 Q Okay. So the gist of the correspondence -- and you can
18 correct me if I'm wrong. And I may get a leading objection
19 here, but you can go ahead and answer. Was the gist of the
20 letter to say that Clematis, single quote, 'Piilu', end
21 quote was being changed to Clematis, single quote, 'Kivso',
22 end single quote, double quote, "Piilu," end double quote,
23 t.m.?

24 MS. SCHNEIDER: Objection. Leading and calls for
25 hearsay.

1 A I believe that's what it was. Without a copy of that
2 e-mail I can't say if that's for sure how the quotes worked
3 on that e-mail.

4 Q Okay. But the -- but the import was that they were
5 changing the name of the plant?

6 A Yes; yes.

7 Q Did you find that a bit unusual?

8 A Yes.

9 Q Why did that -- why was that so unusual for you?

10 A Because changing names of cultivars, as far as I know, is
11 not something that's accepted.

12 Q Okay. When you printed your online catalog or created your
13 online catalog, do you sometimes verify whether a plant
14 cultivar name is correct?

15 A We will assume that the wholesaler has the information
16 correct, unless if we get a correspondence from a customer
17 saying something about -- you know, "I do not think your
18 information's correct. Could you look into this," or
19 something like that.

20 Q Okay.

21 A But we usually go by -- assume the wholesaler has the
22 information correct on their site -- or catalog.

23 Q So unless some reason for doubt is raised, --

24 A Uh-huh (affirmative).

25 Q -- you'll assume that what you're receiving from the grower

1 is accurate?

2 A Correct.

3 Q Now, in your experience both with Garden Crossings and with
4 Walters Gardens, if I were to ask you about Clematis
5 'Piilu', would you -- what would that -- what would that
6 name immediately evoke in your memory -- in your mind?
7 What reference would come immediately to mind?

8 A I would reference that specific plant that I know is
9 growing in my greenhouse right now.

10 Q Okay. You wouldn't immediately think of Spring Valley
11 nursery?

12 A I would probably -- yeah, that would be something that
13 comes to mind, yes. Probably first it would be that I --
14 it's the plant that I list.

15 Q Okay. So the first thing you -- let me make sure -- it's a
16 plant that you list, but you would see a particular
17 plant -- right? -- I mean, with these characteristics?

18 A Yes; yup.

19 Q And that this name 'Piilu' would distinguish that plant
20 from another Clematis variety, 'Jack Manii'?

21 A Yes.

22 Q And it's 'J A C K M A N - --

23 A - I I'.

24 Q -- I I'. Do you know if 'Jack Manii' is a variety name?

25 A It's a cultivar name.

1 Q Cultivar name. Do you know if -- are you familiar with the
2 term Viola?

3 A Yes.

4 Q Is that a -- what is Viola?

5 A Genus -- or I pronounce it Viola or -- if I'm thinking of
6 the same thing here.

7 Q Viola (pronouncing)?

8 A Yeah.

9 Q It's a genus?

10 A I believe so.

11 Q Okay. What kind of plant?

12 A It's got a small, like pansy type of flower to it, --

13 Q Okay.

14 A -- likes cold conditions.

15 Q Okay. If I were to say the term 'Bee's Jubilee' would that
16 have a meaning for you?

17 A It's a Clematis cultivar.

18 Q Okay. If I were to say the term Paeonia, P A E O N I A,
19 would that have a meaning for you?

20 A Yes. It's a genus that Walters Gardens carries.

21 Q Okay. If I were to use the term 'Rhapsody' would that have
22 a meaning for you?

23 A Yes.

24 Q What would that meaning be?

25 A That's a Clematis cultivar.

1 Q Okay. If I were to use the term Ajuga, does it have a --

2 A It's a genus of a ground cover plant.

3 Q Okay. If I were to use the term 'Minister',

4 M I N I S T E R, does that have a meaning for you?

5 A Yes. That's a cultivar of Aquilegia, I believe.

6 Q Okay.

7 MR. KANE: Do you have some cross-?

8 MS. SCHNEIDER: I believe I have only one question,
9 actually.

10 WITNESS: Okay.

11

12 CROSS-EXAMINATION BY MS. SCHNEIDER:

13 Q You were offered 'Piilu' for sale by the grower; is that
14 correct? You were offered --

15 A Garden Crossings was offered --

16 Q Yes.

17 A -- or Walters Gardens?

18 Q Walters Gardens.

19 A Walters Gardens was offered 'Piilu' from the grower.

20 Q And the grower is Mr. or Mrs. Kivistik; is that correct?

21 A I believe that's how you say their name, yes.

22 MS. SCHNEIDER: That's all.

23 MR. KANE: Well, I have a redirect.

24

25

1 REDIRECT EXAMINATION BY MR. KANE:

2 Q The name that she just mentioned, Kivistik, --

3 A Yes.

4 Q -- were you involved with Walters Gardens in the direct
5 communications or discussions on the offering of Clematis
6 from the Polish grower?

7 A I was not.

8 Q Who would be?

9 A Mark Vander Wal. He's our -- handles all the purchasing
10 here.

11 Q Okay. Anyone else in management be informed or involved in
12 those discussions?

13 A John Walters would probably have known.

14 Q Would he know -- how would he know? Would he -- would he
15 be involved in -- well, strike that. When you sell your
16 plants with -- through Garden Crossings, --

17 A Uh-huh (affirmative).

18 Q -- do you change the labels on the plants at all?

19 A No. We use the labels that the wholesaler supplies, unless
20 they don't have any, and then we'll have to make up our
21 own.

22 Q Okay. So in this case the material that's coming from
23 Spring Valley Gardens --

24 A Uh-huh (affirmative).

25 Q -- has a label, and you're just re-shipping the plant with

1 that label?

2 A Correct.

3 Q Where is Spring Valley Gardens located?

4 A They're in Wadsworth, New York.

5 Q Okay. Do you know if they also have a retail segment?

6 MS. SCHNEIDER: Objection. Lack of personal
7 knowledge.

8 MR. KANE: I'm asking him if he knows.

9 A I believe they have a retail outlet.

10 MR. KANE: I have no further questions. We're all
11 set.

12 Q Chad, are there any questions that I asked that -- that
13 you'd like to expand upon or have questions on?

14 A No.

15 Q Okay.

16 MR. KANE: Okay. Thank you very much for coming
17 today.

18 (Deposition concluded at approximately 10:20 a.m.)

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DEPONENT'S CERTIFICATE

I, Chad Michael Walters, do hereby certify that I have read the foregoing transcript of my testimony, given at the time and place set forth on the face sheet of said transcript, and that the same is true and correct.

Chad M. Walters

Date: 9/14/04

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2
3 RECORDER'S CERTIFICATE AND NOTARIZATION

4 I, Sandra Corsiglia, Court Recorder, do hereby certify that
5 on the 30th day of August, 2004, at 1992 96th Avenue, Zeeland,
6 Michigan there did personally appear before me, a Notary
7 Public, Chad Michael Walters; that I did swear said person to
8 tell the truth, and did then electronically record his
9 testimony, the same being later reduced to typewriting, and
10 that the foregoing is a true and accurate transcription of
11 said electronic recording taken at such time and place.
12

13 I further certify that I am not related to, or employed by,
14 any party to this cause or their respective counsel.
15
16

17 
18

19 Sandra Corsiglia, CER-3454
20 Notary Public
21 My commission expires 06-04-2006
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